No. 10,286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA, and AETNA CASUALTY AND SURETY COMPANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

NATURE OF ACTION AND JURISDICTIONAL STATEMENT.

This appeal is from a judgment in an action brought by the Appellee in the United States District Court for the Northern District of California under the Federal Declaratory Judgment Act. (Judicial Code, Section 274d, 28 U.S.C.A., Section 400.) (Tr. p. 2.) The record discloses a diversity of citizenship between the Appellee and the defendants and that the amount in controversy, exclusive of interest and costs, exceeded the sum of three thousand dollars. (Tr. p. 3.) (Par. 1, Sec. 41, Title 28 U.S.C.A.) The judgment decreed that Appellee was and is not

liable to Appellants and the other defendants under an automobile liability insurance policy issued by it to the defendants Fred E. Tunzi and Julius Peterson and made permanent a preliminary injunction restraining Appellants from proceeding to judgment actions brought in the State Court for the purpose of imposing liability on the Appellee by virtue of the policy of automobile liability insurance above mentioned, based upon personal injuries and property damages caused by the negligent operation of a truck and trailer covered by the policy. This Court has jurisdiction of this appeal under Par. (a), Sec. 225, Title 28 U.S.C.A., by virtue of notice of appeal and bond filed September 3, 1942.

FACTS INVOLVED IN CONTROVERSY.

The facts out of which the controversy arose are that on July 11, 1940, Appellee issued to defendant Tunzi a policy of automobile liability insurance covering two trucks and trailers then in the possession and being operated by the defendant Peterson, one of which two trucks and trailers was involved in the accident out of which the claims of Appellants arise. The term of the policy was for one year, July 1, 1940, to July 1, 1941, and provided for the payment by Appellee on behalf of the assured of damages for personal injuries to one person in a sum not exceeding $10,000 and not exceeding $20,000 for two or more persons in one accident and property damages not exceeding $5000 in one accident. The policy

was on July 12, 1940, deposited with the Railroad Commission of California, and thereafter on January 2, 1941, the name of the defendant Julius Peterson was added to the policy by endorsement as an assured with that of the defendant Tunzi. This endorsement was likewise filed with the Railroad Commission.

In issuing its policy the Appellee attempted to limit its liability thereunder by two declarations or warranties and an exclusion clause, as follows:

On the face of the policy in Section 4, there appears the following:

> "The following items are declared by the insured to be true: * * * (e) The Automobile will be principally garaged and used in the above town, county and state, Novato, California, unless otherwise specified herein." (Tr. pp. 15-16.)

By a "Description of Use Endorsement" attached to the policy, it is provided:

> "In consideration of the premium at which the policy designated above is issued, it is warranted by the Insured that
>
> Warranty No. 1
>
> Subject to the territorial limitations of such policy the regular and frequent use of the commerical type vehicle(s) described in such policy is and will be confined to the territory within 100 miles of Novato." (Tr. pp. 22-23.)

The exclusion clause reads as follows:

> "This policy does not apply * * * (referring to the truck) while rented under contract or

leased, unless such use is specifically declared and described in this policy and premium charged therefor." (Tr. p. 28.)

There is also attached to and made a part of the policy a "Termination of Coverage Endorsement" which reads as follows:

"It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission.

It is further agreed that if any policy of which this endorsement forms a part shall be cancelled or otherwise terminated and shall thereafter be reinstated at any time, notice in writing of such reinstatement shall be given by the insurer at the time of issuance thereof to said Railroad Commission at its said office.

It is further agreed by the insurer that the insured is engaged in the business of transporting property for compensation or hire over the public highways in the State of California.

It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part." (Tr. pp. 17-18.)

On January 14, 1941, Appellant Eugene J. Westphalen suffered personal injuries and property damage and Appellant Charles Zanella suffered personal injuries in a collision between an automobile driven by Westphalen and one of the trucks with trailer attached which was covered by the policy, through alleged negligence of defendant Denman R. Curry, the operator of the truck. (Tr. p. 64.) The Appellant Aetna Casualty Company is a subrogee as to certain rights of the Appellant Westphalen. (Tr. p. 66.)

The policy was issued pursuant to the requirements of the Highway Carriers' Act of California, enacted in 1935 (1935 Stat. 878), and amended in 1937 (1937 Stat. 2006, Deerings' Genl. Laws, Act 5129a), the pertinent parts of which are as follows:

"Sec. 5. Protection Against Liability Required. The Railroad Commission shall in granting permits under the provisions of this act, require the highway carrier to procure and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or

death of, more than one person, as the result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property, whether the property of one, or more than one claimant.

Sec. 6. Alternative Methods of Protection. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof,

or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such a policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or a counterpart of said policy.

Sec. 7. Duration of Protection: Regulations. The protection against liability as outlined in Section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall be not cancellable on less than ten (10) days written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of Sections 5 to 7, inclusive."

The Appellee alleged in its complaint or petition that "said policy has been in effect from July 1, 1940, to the date of the accident" (Tr. p. 4) and in its findings the Court found such to be the fact. (Tr. p. 61.) It was a stipulated fact at the trial that no notice under the Termination of Coverage Endorsement was filed with the Railroad Commission prior to January 14, 1941, the date of the accident involved in the controversy. Also, no notice of cancellation was ever given by the insurance company to the assured. (Tr. pp. 88, 129.) It is undisputed that the assured was engaged in the business of transporting property for compensation or hire over and upon the public highways of California.

ARGUMENT.

THE JUDGMENT IS AGAINST LAW.

The learned trial judge in his memorandum and order concluded that the truck and trailer were "rented under contract or leased" at the time of the accident and were therefore not covered by the policy and that the Appellee was not liable to any of the defendants under the policy of insurance. (Tr. p. 58.)

The judgment is against law in that the trial Court erred in its conclusion that the truck and trailer were not covered by the policy and in making permanent the preliminary injunction theretofore issued, thereby releasing Appellee from its liability to Appellants thereunder.

SUMMARY OF APPELLANTS' CONTENTIONS.

To summarize Appellants' position we submit:

(a) That the policy of automobile liability insurance involved in this appeal is a statutory or compulsory policy as distinguished from a voluntary policy;

(b) The policy having been issued under and because of the requirements of the Highway Carriers' Act of California, as a means of protection to the public should be most favorably construed to effectuate the objects and purposes of the regulatory statute;

(c) The provisions of the Termination of Coverage Endorsement providing that the policy should not terminate or become void for any reason during its term until after the prescribed 10 days' notice was

given to the Railroad Commission, nullified the two warranties relied upon by Appellee to escape liability under its policy;

(d) The policy was on the date that Appellants' cause of action arose against the assured in full force and effect and could only have been cancelled by the giving of the 10 days' notice to the Railroad Commission as provided in the Highway Carriers' Act;

(e) The limitations in the policy or in endorsements thereon and forming a part thereof attempting to limit the liability of Appellee to Appellants are contrary to the express purpose and object of the statute requiring the issuance of the policy and are therefore void as against public policy and invalid insofar as such limitations affect the rights of Appellants under the policy, Appellants being injured third persons; and

(f) No breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy.

CONSTRUCTION OF POLICY.
(Summary a and b.)

The requirement of securing sufficient insurance prior to receiving authority to do business in a state is considered compulsory and not voluntary.

Worrell v. Worrell (1939), 174 Va. 11, 4 S. E. (2d) 343.

The statute being one primarily for the benefit of the public, both the statute and policies issued under

and because of its requirements, should be most favorably construed to favor the public and strictly against the insurer to give the maximum protection obtainable.

Bleimeyer v. Public Service Mut. Cas. Ins. Corp., 250 N. Y. 264, 165 N. E. 286.

The purpose of the regulatory statute is to protect the public against reckless operation of such vehicles by financially irresponsible owners, and to provide a means of recovery for those injured in their person or property by such operation.

Sills v. Schneider (1939), 197 Wash. 659, 86 Pac. (2d) 203;

Hindel v. State Farm Mut. Auto Ins. Co. of Bloomington, Ill. (C.C.A.), 97 Fed. (2d) 777;

Travelers Mut. Casualty Co. v. Herman (C.C. A.), 116 Fed. (2d) 151.

Furthermore, it has been held that the obligations of such a policy as the one under consideration here are measured and defined by the pertinent statute and the two together form the insurance contract, and that such statute must be construed in its entirety and in view of the purpose of the legislature to furnish uniform protection.

Schulte v. Great Lakes Forwarding Corp. (1940), 288 Iowa 1012, 291 N. W. 158;

Commercial Standard Ins. Co. of Fort Worth v. Foster (D.C., 1940; affirmed C.C.A.), 121 Fed. (2d) 117;

Hipp v. Prudential Cas. & Surety Co. of St. Louis, 346 S. D. 300, 244 N. W. 346.

UNDER THE PROVISIONS OF THE TERMINATION OF COVERAGE ENDORSEMENT APPELLEE IS LIABLE ON ITS POLICY REGARDLESS OF VIOLATIONS OF WARRANTIES BY ITS ASSURED.

(Summary c and d.)

We invite the attention of the Court to the Termination of Coverage clause which was made a part of the policy by way of endorsement. This endorsement was obviously required by the Railroad Commission of California because of the requirements of the Highway Carriers' Act in order that the assured might qualify for the issuance of the necessary permit to conduct their operations as highway carriers. It was specifically provided in this endorsement that such Public Liability (Bodily Injury Liability) and Property Damage Liability as is afforded by the policy *should not terminate or become void for any reason whatsoever* except by the annual expiration of the policy, *any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding,* until after ten days' notice thereof in writing was given to the Railroad Commission by the insurer. (Tr. pp. 17-18.)

It is undisputed that the policy was effective on the date of the accident and that no notice of its cancellation was given as provided in the statute or otherwise. The coverage originally afforded by the policy specifies Bodily Injury Liability and Property Damage Liability to persons for personal injuries or Property Damage occasioned by the operations of the insured upon the hghways. (See Part 2 Coverages A and B of Policy, Tr. p. 22.) This coverage was afforded at all times after July 1, 1940, including the date of

the accident, because the endorsement specifically provided that such liability as was afforded by the policy should not *terminate or become void for any reason whatsoever,* except by the annual expiration of the policy, any statement therein or in any endorsement forming a part thereof to the contrary notwithstanding until after the ten days' notice in writing given to the Railroad Commission, which in this case was never given. We respectfully submit that this provision of the Termination of Coverage Endorsement which without doubt was required by the Railroad Commission under the express provisions of the Highway Carriers' Act, is completely at variance with the two warranties above referred to and had the effect of nullifying and rendering them unavailable as a defense to Appellee in this action.

THE EXCLUSION CLAUSE IN THE POLICY AGAINST RENTING IS VOID AS TO APPELLANTS ON THE GROUND OF PUBLIC POLICY.

(Summary e.)

This clause is void as to appellants upon the ground of public policy as a violation of the expressed purpose of the California Highway Carriers' Act. It is neither necessary to indulge in speculation nor resort to conjecture to ascertain and determine the intent and purpose of the legislature of California when it enacted the Highway Carriers' Act. In specifying in the law, as it did, that highway carriers be required to provide and to continue in effect during the life of the permit, *adequate protection* by the procuring of

liability insurance policies which could only be cancelled during the term for which they were issued by and through a prescribed method of giving notice to the Railroad Commission, the legislature intended to provide a system of protection for the public generally and in particular those of its members who would be so unfortunate as to receive injuries to their person or property through the carelessness or negligence of highway carriers. In employing the phrase *"adequate protection"* the legislature intended to mean and could only mean just exactly what the words imply, *namely,* not only protection but, further, that such protection be ample and sufficient. For the definition of the word "adequate" we are informed by Webster's Dictionary that the meaning is *"equal to requirement", "sufficient", "competent", "suitable".* Can it be said with any degree of accuracy or truthfulness that the protection in the instant case was adequate, if Appellee can evade its liability to Appellants through any violations by its assured of any such limitations as is relied upon by Appellee? We think not.

If insurance carriers be permitted to avoid liability to injured third persons through the claims of violations by their insured of such limitation clauses as we are here confronted with, then the whole purpose of the statute is frustrated and no protection is afforded to the public for the very obvious reason that just when the public risk becomes the greatest and this protection is most required, the protection ceases to exist. We are not here concerned with the question as to how the limitations on liability might affect rights

or claims of the insured for indemnty but if such rights of the public be jeopardized or eliminated, the protection designed and intended by the makers of the law is rendered far from *adequate*. As was said by the Court in the case of

> *Consolidated Shippers v. Pacific Employers Ins. Co.*, 45 Cal. App. (2d) 288 at page 293 (114 Pac. (2d) 34):
>
> *"As between themselves the parties were entirely competent to limit the liability in any manner they saw fit, although under the law such limitation would be invalid as to an injured claimant under the policy."*

The opinion from which the above is a quotation concerned two policies of liability insurance issued under the provisions of the Federal Motor Carrier Act of 1935 (49 U.S.C.A., Sec. 315) (see Appendix) which so far as its purpose to afford protection to the public is concerned is no more specific or of greater scope than is the California Highway Carriers' Act, and under the broad principle of public policy any such limitation in its liability to Appellants as is contended by Appellee by reason of this exclusion clause would be invalid and of no effect whatsoever.

The finding of the Court was that the truck and trailer were by the defenant Tunzi "hired, rented under contract, or leased" to the defendant Denman R. Curry (Tr. p. 67) and is based upon testimony which revealed very indefinite dealings between these defendants with respect to the operation of the vehicle. (Testimony of Tunzi, Tr. pp. 79, 80, 81, 82.) Con-

ceding for the purpose of this argument that such negotiations as were had between Tunzi and Curry constituted a lease of the truck and trailer by the former to the latter, the relationship of lessor and lessee if it did exist did not release Appellee of its liability to Appellants under its policy for the reason that any contract contrary to the spirit or purpose of the regulatory act would as to Appellants be void as against the policy of the law. As an authority for this proposition we cite the case of

McDonald v. Lawrence, 100 Wash. 215, 170 Pac. 576 at 577,

wherein the Supreme Court of the State of Washington in construing rights under a very similar situation to that which existed in the present action with respect to the use of an automobile, said in part:

> "It is the claim of appellants that this evidence shows a bailment or lease of the automobile by Lawrence to Krueger, whereby the appellants would be exonerated from any liability for the negligence of Krueger, and that the Court should have directed a verdict in favor of appellants. We think this testimony of the witness Krueger is susceptible of either one or two constructions, namely, that he was the lessee of appellant Lawrence, or that he was an employee. This would naturally present a question for the jury, and the inference from the evidence adopted by them would be controlling. * * * But should we agree with appellants that the evidence under discussion presented a question of law for the court in that it clearly showed a letting rather than an employment, *we would be compelled to hold*

against appellants on the ground of public policy. The legislature has unmistakably announced the policy of the state as to the manner in which the carriage of passengers for hire by motor vehicles in cities of the first class is to be regulated, and any contract entered into which would be evasive of the dominant purpose of the act would be void. For that reason the contract between Lawrence and Krueger could not be construed otherwise than as a contract of employment. And, indeed, since such an inference can be readily drawn from the evidence, it ought to be so construed, in view of the fact that no other relation would be justified under the purpose of the regulative statute."

We submit that the sound reasoning announced by the Supreme Court of Washington applies with equal vigor to the case under consideration and the conclusion there reached by the Court that to hold such arrangements as were had between the defendants Tunzi and Curry as constituting anything but the relationship of employer and employee would at least so far as Appellants are concerned destroy and entirely defeat the objects and purposes of the Highway Carriers' Act. Hence, if the very indefinite negotiations between these defendants, Tunzi and Curry, constituted the relationship of lessor and lessee, such negotiations or contract, were void as to Appellants herein as against public policy and the contract of renting being void, the exclusion clause against renting in the policy would necessarily come under the same category and thereby be rendered unavailable as a defense

to Appellee so far as the rights of Appellants are concerned.

What we have here said with reference to the invalidity of the exclusion clause applies also to the two warranties heretofore discussed.

NO BREACH OF THE TERMS OF A COMPULSORY POLICY BY ASSURED CAN PREJUDICE THE RIGHTS OF INJURED THIRD PERSONS TO RECOVER UNDER THE POLICY.

(Summary f.)

The general rule that defenses available to insurance carriers by reason of acts or omissions on the part of their insured in actions on purely voluntary policies has no application in actions involving rights of injured third persons under compulsory or statutory policies such as is under consideration in this appeal has found expression by the Supreme Court of California in the case of

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999.

This was an action brought against the insurer which defended on the ground of want of cooperation by the assured. The Court held that such a defense is good except in those cases where the statute required the insurance to be carried, and at page 751 the Court said:

> "It is not a compulsory insurance law, requiring every automobile owner or those in a particular class to secure insurance for the protection of the public generally. This latter type of statute, frequently found in the regulation of taxicabs and

other carriers for hire, has usually been given a construction consonant with its purpose, as a result of which the injured party is permitted to recover against the insurance company *regardless of the acts of the assured.* (See Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 Pac. 602)", and other cases there cited.

In

Kruger v. California Highway Indemnity Exchange, supra.

plaintiff had been injured by a collision with a jitney bus. The jitney bus driver was required by a San Francisco ordinance to provide and carry the type of insurance involved in this appeal. The defendant insurance company attempted to set up as a defense breach of the terms of the policy by the assured in that he did not give the proper notice to the insurance company of service on him of summons. At page 680 of the opinion the Court stated in part:

"This failure on the part of Delaney to forward to appellant the papers served upon him would undoubtedly be a good defense to an action brought upon the judgment by Delaney against appellant, but it is without effect in the present action brought by respondent. Appellant's undertaking to pay the judgment to plaintiff is absolute and is not conditioned upon Delaney's agreement to forward to appellant said papers or any papers which may be served upon him. *The latter's failure to perform his part of the agreement cannot in any way affect appellant's liability to third persons expressly and unconditionally assumed by the terms of the policy.*"

Appellants therefore respectfully submit that regardless of the breach of any declarations or warranties contained either in the policy or in endorsements forming a part thereof, by the defendants Tunzi, Peterson or Curry, which Appellee might assert in actions brought by them upon the policy, such defenses are not available to Appellee as to any member of the general public irrespective whether the acts or omissions of the assured complained of were committed prior or subsequent to the date of the accident. This principle of law applied because of the express statutory requirement that the public be *adequately protected* against injury to person or property by reason of the negligent operation of motor vehicles operated for the transportation of persons or property for hire over the highways of California but does not apply in actions involving voluntary policies. Nor is this requirement of the statute in any way affected or to any degree diminished or altered by the omission in the act itself or in any regulations promulgated thereunder giving to Appellants a primary right of action against Appellee on the policy without first having established their claims against assured. The purpose and object of the statute being without question the means of providing protection to the public, no act or omission on the part of the assured violative of any clause in the policy, whether prior or subsequent to the inception of the cause of action can affect the right of injured third persons to recover upon the policy.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Oakland, California,
January 15, 1943.

ALBERT M. HARDIE,
Attorney for Appellants,
Eugene J. Westphalen and Aetna Casualty and Surety Company (a corporation).
FRANK W. TAFT,
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Charles Zanella.

(Appendix Follows.)

Appendix.

Appendix

PORTION OF FEDERAL MOTOR CARRIER ACT REFERRED TO IN ARGUMENT.

No certificate or permit shall be issued to a motor carrier or remain in force unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements in such reasonable amount as the Commission may require conditioned to pay within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements any final judgment recovered against such motor carrier for bodily injury to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others.